Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

TSA Stores, Inc. (The Sports Authority)

Petition For Declaratory Ruling with Respect of Certain Provisions of the Florida law and regulations.
_____/

CG Docket No. 02-278
DA-05-342

STATE OF FLORIDA'S MOTION TO DISMISS FOR LACK OF JURISDICTION AND OTHER GROUNDS

Louis E. Stolba, Esq.
Senior Attorney
Florida Department of Agriculture and Consumer Services
Room 515- Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399-0800
Telephone No. (850) 245-1000
Facsimile No. (850) 245-1001
FBN 121249

Attorney for Florida Department of Agriculture and Consumer Services

INTRODUCTION

State of Florida, Department of Agriculture and Consumer Services, ("Florida") is a state regulatory agency and the enforcing authority of Section 501.059, Florida Statutes. Florida, pursuant to Section 501.059(4), Florida Statutes maintains a list of telephone numbers of consumers that do not want to receive telephone sales calls from telephone solicitors or telemarketers. These consumers pay Florida an annual fee to have their telephone number appear on the "no sales solicitation call" list. The No-Sales Statute (§501.059(4), Fla. Stat.) make it unlawful to make, or cause to be made, an unsolicited telephonic sales calls to persons whose numbers appear on the list published by Florida.

Further, Section 501.059(7), Florida Statutes makes it unlawful for a telemarketer to make, or cause to be made, a telephonic sales call and use, or knowingly allow, an automated dialing system for the selection and dialing of telephone numbers or playing a recorded message when the number called is answered.

Florida received a complaint from numerous consumers that TSA Stores, Inc., was violating Florida's statutes by making, or causing to be made, unsolicited telephonic sales calls to such consumer whose name was on the state's no sales solicitation call list and playing, or causing to be played, a

recorded messages when the number called was answered. After each consumer complaint, Florida sent a letter to TSA Stores, Inc., together with a copy of the consumer's complaint and a copy of Florida's statute. Because TSA Stores, Inc., failed to comply with Florida law, suit was filed seeking an injunction and civil penalty. TSA Stores, Inc., filed a Petition For Removal to the United States District Court for the Middle District of Florida alleging that Florida's law was preempted by 47 U.S.C. §227. Florida filed a Motion For Remand. The United States District Court entered an order of Remand finding that Florida's law was not preempted by 47 U.S.C. §227. A copy of such opinion has been attached to a previous Motion heretofore filed by Florida. State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc., Case No. 6:04-cv-115-Orl-JGG, U.S. District Court, Middle District of Florida.

TSA Stores, Inc., seeks to have the FCC to declare that Florida's statute is preempted by Federal Law. The relief sought from the FCC by TSA Stores Inc., is an attempt to allow a telemarketer to cause calls to be made to Florida consumers and allow the playing of a recorded message when the number called is answered, in violation of Florida law.

Florida re-incorporates by reference its previously filed Motions To Dismiss and the arguments set forth therein.

ISSUE

Florida Statute 501.059 is not preempted by TCPA.

ARGUMENT

Without waiving it jurisdictional argument set forth herein, Florida asserts that Section 501.059, Florida Statutes is not preempted by the TCPA or included within the contemplation of TCPA. TCPA defines "telephone solicitation" as the initiation of a telephone call. TCPA also provides that it is unlawful to initiate or make the telephone solicitation to persons whose names appear on the federal do-not-call list. However, Florida's law is different from TCPA. Section 501.059(4), Florida Statutes, provides:

> "No telephone solicitor shall make **or cause to be made** any unsolicited telephonic sales call to any residential, mobile or telephonic paging device telephone number, if the number for that telephone appears in the then-current quarterly listing published by the Florida." [Emphasis added]

Also, section 501.059(7), Florida Statutes, provided:

> "No person shall make **or knowingly allow a telephonic sales call to be made** if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to the number called." [Emphasis added]

Causing the call to be made or **knowingly allowing** a recorded message to be played is not preempted by TCPA. Florida's action against TSA Stores, Inc., is for **causing** the telephonic sales call to be made or **knowingly allowing** a recorded message to be played. The entity actually making the call and the entity **causing** the call to be made may be two separate entities. For example,

a Florida corporation hiring **(causing)** a California company to make the calls is in violation of Florida's statute if the California company fails or refused to obey Florida's law in the manner that such calls are made on behalf of the Florida corporation.

Further, the actually making of the call and the **causing** of the call to be made are two separate activities. It can be argued (and Florida does not agree with the argument) that the initiation of the telephonic sales call is preempted. However, the **causing** of the call to be made is an activity not contemplated by TCPA and is an activity properly regulated by the State of Florida. The **causing** of the call to be made can be done through business practices, such as, hiring telemarketers, setting policies in motion to allow the playing of a recorded message when the number called is answered, or providing employees with facilities and equipment essential to **causing** such calls to be made to Florida's consumers.

Thus, TSA Stores, Inc., (1) having **caused** the calls to be made to persons whose names appear on the Florida's do not call list, and (2) having **knowingly allowed** prerecorded messages to be played when the number called was answered, are separate actions from initiation or making of telephonic sales calls.

ISSUE

Re-litigation of preemption issue improper

ARGUMENT

The United States District Court for the Middle District of Florida has decided that 47 U.S.C. §227 does not preempt Florida's statute. A copy of the decision has been attached to Florida's previous Motion. State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc., Case No. 6:04-cv-115-Orl-JGG, U.S. District Court, Middle District of Florida. Re-litigation of this issue is improper. See Keaty v. Keaty 397 F.3d 264 (5th Cir. 2005) wherein the Court held:

> "The requirement that an issue be 'actually litigated' for collateral estoppel purposes simply requires that the issue is raised, contested by the parties, submitted for determination by the court, and determined. *McLaughlin v. Bradlee,* 803 F.2d 1197, 1201 (D. C. Cir. 1986) … Restatement (Second) of Judgments §27 cmt. d (1982) (stating that an issue is actually litigated when it is 'properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined')."

ISSUE

EBR exemption does not apply to recorded message calls in Florida

ARGUMENT

TSA Stores, Inc., asks everyone that passes by a TSA Stores, Inc., cash register to provide a telephone number. No information is given the consumer regarding what TSA Stores, Inc., will do with do with this telephone number. TSA Stores, Inc., causes recorded message telemarketing calls to be made to these unwary consumers. The consumers by giving their telephone numbers to a cashier are not agreeing to receiving future telemarketing calls.

Florida receives consumer complaints regarding telemarketing calls and such complaints are sent to the alleged violator. Only after consumer complaints continue, unabated, does Florida file suit for injunctive relief and civil penalty. This is the case with TSA Stores, Inc.

In Florida, EBR exemption does not apply to recorded message calls. The statutory language is very clear.

Florida statute makes it unlawful for (1) a telephone solicitor to make, or cause to be made, any **unsolicited telephone sales** call to a telephone number that appears in the then-current quarterly listing published by the Department of Agriculture and Consumer Services [§ 501.059(4) Fla. Stat.]; and, for (2) any person to make or knowingly allow a **telephonic sales call** to be made if such call involves an automated system for the selection or dialing

of telephone numbers or the playing of a recorded message when a connection is completed to a number called. [§ 501.059(7) Fla. Stat.]

An **"unsolicited telephone sales call"** means a telephonic sales call other than a call made (1) in response to an express request of the person called; (2) primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call; (3) to any person with whom the telephone solicitor had a prior or **existing business relationship**; or (4) by a newspaper publisher or his or her agent or employee in connection with his or her business. [§ 501.059(1)(c) Fla. Stat.]

A **"telephone sales call"** is a call made by a telephone solicitor to a consumer, for the purpose of soliciting a sale of any consumer goods or services, or for the purpose of soliciting an extension of credit for consumer goods or services, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes. [§ 501.059(1)(a) Fla. Stat.]

The Florida statute allows companies to make calls to EBRs. What the Florida statute prohibits is making recorded message calls to EBRs.

TCPA DOES NOT PREMPT STATE LAW

ISSUE

TCPA specifically provides that State law is not preempted and that States can enforce State law.

ARGUMENT

Without waiving it jurisdictional argument set forth above, Florida will show that Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA") does not preempt Florida's statute. In fact, TCPA specifically provides that it does **not** preempt state law. TCPA at 47 U.S.C. §227(e) provides:

> "(1) **State law is not preempted.** Except for the standards under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations or which prohibits—
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisement;
>
> (B) the use of automatic telephone dialing systems;
>
> (C) the use of artificial or prerecorded voice messages; or
>
> (D) the making of telephone solicitation."

Further, TCPA at 47 U.S.C. §227(f)(6) provides:

> "**Effect on State court proceedings**. Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State."

TCPA at several points shows that it is intended to allow state court jurisdiction over interstate calls. For example, 47 U.S.C. §227(b)(3), part of the TCPA subsection dealing with misuse of

automated telephone equipment, provides in part that "[a] person or entity may, **if otherwise permitted by laws or rules of court of a State, bring in an appropriate court of that state…** an action based on a violation of this subsection or the regulations proscribed under this section…" (emphasis added). Similarly, the TCPA subsection dealing with violations of the "Do Not Call" registry provides that "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations proscribed under this subsection **may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State…**an action to recover for actual monetary loss from such violation, or to receive up to $500 in damages for each such violation, whichever is greater." 47 U.S.C. §227(c)(5) (emphasis added).

The burden in preemption case is upon the party seeking to preempt a state's law. In the case of AT&T Corp., v. Public Utilities Commission of Texas, 373 F.3d 641 (5th Cir Ct. App., 2004) provided:

> "The burden of persuasion in preemption cases lies with the party seeking annulment of the state statute. *Green v. Fund Asset Mgmt., L.P.,* 245 F.3d 214, 230 (3d Cir. 2001) ("Finally, we note that the party claiming preemption bears the burden of demonstrating that federal law preempts state law." (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S.Ct. 616, 78 L. Ed.2d 443 (1984))."

TSA Stores, Inc., has failed to meet it's burden of proof. Inconvenience in compliance with state law is not grounds to have the state's law preempted. Preemption is not inferred nor granted by implication.

Courts (and presumably executive agencies whose decisions are reviewable by courts) will not infer preemption and will always presume Congress did not intend to displace State law unless Congress does so clearly and unmistakably. Gregory v. Ascroft, 501 U.S. 452, 461 (1991) (a court will not construe a federal statute to "upset the unusual constitutional balance of federal and state powers" unless Congress "[made] its intention to do so unmistakably clear to the language of the statute.").

The presumption against preemption is especially important when determining the preemptive effect of administrative regulation, as opposed to the underlying federal statute. As explained by the court in Hillsborough County v. Automated Medical Labs, Inc., 471 U.S. 707, 717, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985):

> As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency steps into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

And, consumer protection laws enjoy an even greater presumption against preemption:

> Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included with the states police power, and are thus subject to this heightened presumption against preemption. (See California v. ARC Americal Corp. (1989) 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L.Ed. 2d 86 [unfair business practices]; Smiley v. Citibank (1995 11 Cal. 4th 138, 148, 44 Cal. Rptr 2d 441, 900 P.2d 690 [consumer protection], affd. (1996) 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 ….

Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445, 452-53 (Cal Ct App. 2001).

In Van Bergen v. Minnesota, 59 F. 3d 1541 (8th "Cir. 1995) the Court addressed the TCPA preemption issue with respect to the Minnesota statute regulating ADAD calls to consumers. In Van Bergen, a gubernatorial candidate in Minnesota brought an action against the State Attorney General, arguing the the TCPA preempted Minnesota's statute prohibiting the use of automatic dialing-announcing devices. The Court said:

> The congressional findings appended to the TCPA state that "[o]ver half the States now have statutes restricting various uses of telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore Federal law is need to control residential telemarketing practices. 47 U.S.C. §227, Congressional Statement of Findings (7). This finding suggests that the TCPA was intended not to supplement state law but to provide interstitial law preventing evasion of state law by calling across state lines."

Contrary to TSA Stores, Inc., argument, Congress enacted the TCPA to broaden State authority, not supplant State law.

Finally, there is not conflict preemption. Conflict preemption occurs where compliance with both federal and state laws is a physical impossibility. "Thus, if it is possible to comply with both federal and state law, there is neither conflict nor a frustrated purpose. See generally Rotunda, R. & Nowak, J., Treatise on Constitutional Law; Substance and Procedure, §12 (2d ed. 1992 & Supp. 1993)." Bravman v. Baxter Healthcare Corp., 842 F. Supp. 747, 753 (S.D. N.Y. 1994; see also Ginochio v. Surgikos Inc., 864 F. Supp. 948, 951 (same). Here it is possible for TSA Stores, Inc., to comply with both laws simply by following the Florida law. Doing so does not violate any provision of the TCPA.

ISSUE

The FCC does not have jurisdiction in this matter because the State of Florida's sovereign immunity protects it from being brought before a federal administrative tribunal. See Federal Maritime Commission v. South Carolina State Port Authority, et al., 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

ARGUMENT

The FCC does not have jurisdiction in this matter because the State of Florida's sovereign immunity prohibits the Federal Administrative Agency from hearing this matter. Florida does not consent to participate in the proceeding and Florida's sovereign immunity is neither waived, nor abrogated by Congress.

In the case of Federal Maritime Commission v. South Carolina State Ports Authority, et al. 535 U.S. 743, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002) the United States Supreme Court upheld a State's jurisdictional challenge of a Federal Administrative Agency's jurisdiction on the grounds of sovereign immunity. The Federal Maritime Commission sought to take administrative action against South Carolina State Port Authority upon the complaint of a cruise ship company. In finding the Federal Administrative Agency did not have jurisdiction to hear the case the United States Supreme Court held:

> "It is for this reason, for instance, that sovereign immunity applies regardless of whether the private Plaintiff's suit is for monetary

> damages or some other type of relief. See *Seminole Tribe,* 517 U.S., at 58, 116 S. Ct. 1114 ('[W]e have often made it clear that the relief sought by a Plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment").
>
> Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit."

The United State Supreme Court further held in Federal Maritime Commission, at 767-768:

> "…we noted in *Seminole Tribe* that 'the background principle of the state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area … that is under the exclusive control of the Federal Government," 517 U.S. at 72, 116 S. Ct. at 1114. Thus, '[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.' *Ibid*."

TSA Stores, Inc.'s Petition for For Declaratory Relief is an action by a private citizen (a corporation) to have a Federal Administrative Agency find that Florida's statutes are preempted by Federal law. This is an analogous factual situation giving rise to the Federal Maritime Commission case. The United States Supreme Court held that sovereign immunity prohibited the Federal Administrative Agency from proceeding against a State. The principle of the Federal Maritime Commission case would prohibit a Federal Administrative Agency from proceeding against a State by finding (upon request of a private citizen) a State's law is preempted by Federal law.

The exception to the sovereign immunity exemption of Ex Parte Young 209 U. S. 123 (1908) does not apply in this case. Ex Parte Young held that the Eleventh Amendment does not bar lawsuits that seek future equitable

relief to discontinue ongoing violations of federal law by State officers. Ex Parte Young prescribed to a legal fiction that the State officers who act contrary to the Constitution or federal law strip themselves of their official capacity and thus, their derivative sovereign immunity. There are no such allegations of improper activities by the Defendant's employees in this matter.

CONCLUSION

For the reason stated herein, the Petition filed by TSA Stores, Inc., should be dismissed (1) because Florida's law is not preempted by TCPA; or (2) because this matter has already been decided by the United States District Court for the Middle District of Florida; or (3) because state law is not preempted by TCPA; or (4) because FCC does not have jurisdiction because of sovereign immunity.

By: _____

Louis E. Stolba, Esq.
FBN 121249
Room 515- Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399-0800
Telephone No. (850) 245-1000
Facsimile No. (850) 245-1001

Attorney for State of Florida, Department of
Agriculture and Consumer Services